

Statement for the Record

**House Judiciary Subcommittee on
Crime, Terrorism and Homeland Security**

Hearing

on

Reauthorizing the Patriot Act



Statement for the Record

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Statement of
The Honorable Robert S. Litt
General Counsel
Office of the Director of National Intelligence

Before the
House Judiciary Subcommittee
on Crime, Terrorism and Homeland Security
on “USA PATRIOT Act Reauthorization”
March 9, 2011

Chairman Sensenbrenner, Ranking Member Scott and members of the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security, thank you for inviting me to testify today concerning the three provisions of the Foreign Intelligence Surveillance Act (FISA) that are scheduled to sunset again on May 27, 2011. The Department of Justice has provided a brief overview of the three expiring provisions (the “roving” surveillance provision, the “lone wolf” definition, and the “business records” provision) and has explained in general terms how these authorities have been used in practice. I will focus on two things: (1) the Intelligence Community’s need for these authorities to keep the Homeland safe and (2) the safeguards that are in place to ensure that the authorities are used responsibly, in a manner consistent with the law and with appropriate protections for Americans’ privacy and civil liberties.

The threat to the Homeland from violent extremists is growing. As Director of National Intelligence Clapper testified recently, counterterrorism is the Intelligence Community’s top priority. Since 9/11, the Intelligence Community has helped thwart many potentially devastating attacks, apprehend numerous known and suspected terrorist throughout the world and greatly weaken much of al-Qa’ida’s core capabilities. The nature of the terrorism threat that we face is evolving. Our adversaries are constantly adapting their strategies and communication techniques. As Mr. Hinnen noted in his testimony, the provisions that are expiring — the roving wiretap provision, the “lone wolf” definition, and the business records authority — along with other critical intelligence tools, provide valuable tools needed to help us detect and disrupt plots directed against the United States.

One aspect of this evolution that is particularly relevant to the “lone wolf” definition is the growing threat from individuals, both at home and abroad, whose affiliation with foreign terrorist organizations, if any, is often vague. Although such violent extremists come in many forms, they often operate independent of one another and largely independent of any organized terrorist group overseas such as al-Qa’ida.

Increasingly sophisticated propaganda that is easily accessible and downloaded through the Internet and social media can quickly shape the views of extremists and provide them guidance, inspiration or justification to carry out attacks, even when they may not have received direct instruction or assistance from foreign terrorist organizations. Indeed, some al-Qa’ida organizations — in particular al-Qa’ida in the Arabian Peninsula (AQAP) — have actually

sought to encourage and “virtually” recruit such actors through their propaganda.

In some instances, these individuals come to our attention when they take direction or get training and equipment from international terrorists, whether in Pakistan, Yemen or elsewhere. But we may encounter some potential terrorists about whom we know only that they are inspired by the foreign terrorist organizations, and perhaps seek guidance from them, but we have insufficient intelligence to conclude that they are acting for or on behalf of an international terrorist organization. This would include violent extremists who are inspired by the international terrorist organizations — who seek to further their objectives — but who may not be agents of those organizations.

It is this situation — one which the Intelligence Community believes is a realistic possibility — the “lone wolf” definition can provide us critical intelligence capabilities. As Mr. Hinnen explained, absent the “lone wolf” definition, the United States Government is required to establish probable cause to show that a person is acting as an agent of a specific foreign power, which could include an international terrorist organization, before the United States can initiate electronic surveillance in the United States against the person for foreign intelligence purposes. In certain cases, we might encounter a non-United States person within this country, have information that indicates he is planning a terrorist attack, using the aims and means of international terrorism, but not have information sufficient to establish probable cause that he is acting “for or on behalf of” an international terrorist organization. In some cases, the United States Government may be able to nonetheless proceed with criminal electronic surveillance under Title III and thereby be able to monitor and ultimately thwart the subject’s terrorist plans. But in other cases, Title III coverage might not be available and the Government would be forced to delay the institution of electronic surveillance until further information can be acquired from other sources. In the face of an active terrorist threat, such a delay could have profound consequences. Moreover, while Title III coverage might be available in some such cases, it may be impossible to use that tool and still protect critical intelligence sources and methods. In this case, the “lone wolf” definition may provide the only opportunity to track a potential terrorist and prevent a damaging attack on the homeland.

Over the years, a number of myths have developed about these authorities. At times, these myths have overshadowed the truth. It is easy to understand how some of these myths have developed. I will be the first to admit that FISA is a complicated statute. In addition, while transparency is important to the functioning of our government, so is the ability to conduct certain activities in secret so that our adversaries will not be able to take countermeasures and avoid detection. Therefore, certain uses of these authorities have remained classified, and although they have been fully briefed to the appropriate committees of Congress, this has made it more difficult to understand the complexities of FISA. Therefore, I think it is important to try to clarify some of the common misunderstandings regarding the expiring provisions.

- First, I want to reiterate what the Department of Justice has told the Committee and re-emphasize that contrary to some public reports, none of the provisions up for renewal provide the Intelligence Community with unchecked authority. Each of these provisions — the “lone wolf” definition, the roving wire tap provision and the FISA Business Records provision — requires that before the Intelligence Community undertakes

collection, a federal court must review the matter and issue an order authorizing collection. The requirement of independent judicial review helps ensure that the balance is appropriately struck in each case between the government's need to acquire information to protect the country from potential threats and the need to safeguard the constitutional rights and civil liberties of U.S. persons.

- Second, these are critical tools that help the Intelligence Community disrupt terrorist plots and without these authorities we hamper our ability to keep America safe by detecting and disrupting the next attack before it happens.
- Third, although Title III wiretaps, grand jury subpoenas and criminal search warrants are important tools, they cannot substitute for the FISA. Most notably, the procedural requirements associated with Title III wiretap, including disclosure to the target and full discovery of the basis for the surveillance may make it impossible to protect critical intelligence sources and methods.
- Fourth, the concerns about “Roving John Doe” wiretaps are misplaced. While the government may not always have the name of the person to be targeted, we must always be able to provide the FISA Court sufficient detail to identify the person with particularity. If we are not able to do that, we have failed to meet the statutory requirements and the FISA Court will not authorize the use of the authority.
- Fifth, the roving authority is not, and cannot, be used to, for example, wiretap an entire neighborhood in the hopes of acquiring intelligence information. Even when the FISA Court has granted authority for a roving wiretap, we can only conduct surveillance on a phone if we believe the target of the surveillance is using it.
- Sixth, Congress, though the appropriate oversight committees, is aware of how the FISA authorities are used.
- Seventh, the FISA Court is not a “rubber stamp” for the government. It is true the Court operates in secret and on an ex parte basis since it is almost always necessary to keep the identities of the targets and the intelligence used to identify the targets secret. But the judges and staff of that Court give a searching review to every application that comes before them, and frequently require changes or limitations on proposed orders.

I want to take that last point, and place it in the broader context of the oversight process that exists to ensure that the expiring authorities and FISA in general, are used in compliance with the Constitution and the law.

The Executive Branch understands its obligation to ensure that it exercises the powers granted it in accordance with the law and in a manner that protects civil liberty and privacy rights. We believe that vigorous and effective oversight — by all three branches of government — is essential to help ensure that the American people have confidence in our ability to protect both their civil liberties and their security. The public has entrusted the Intelligence Community with

important powers and it is our collective duty to ensure that those powers are exercised responsibly.

The legal framework we operate under is founded on the Constitution and in particular the First and Fourth Amendments. It includes the FISA itself, which prescribes specific and detailed requirements that must be met for the exercise of these authorities. It also includes Executive Orders governing the Intelligence Community which limit the collection, retention and dissemination of information concerning U.S. persons. Taken together, these provide an extensive legal framework protecting individual privacy and liberty. This framework is overseen by all three branches of the government.

First, the judiciary. The FISA Court is composed of eleven Article III judges selected from districts around the country and appointed by the Chief Justice of the United States for seven-year terms. As noted above, the judges of the FISA Court engage in a thorough and searching review of every FISA application to ensure that the application complies with the statutory standards. Moreover, the FISA Court not only approves the use of these authorities, it also takes an active role in ensuring that the government is complying with the FISA Court orders, by regularly reviewing the activities approved, prescribing procedures that agencies must follow in executing their orders and by requiring that violations of these procedures be reported.

In addition to the oversight by the FISA Court, the Executive Branch has developed its own robust oversight regime. First, FISA applications, which require a high level of approval within the Executive Branch, receive extensive and detailed review before the application is submitted to the FISA Court. In fact, FISA applications receive far more extensive review than criminal search warrants or electronic surveillance orders. Moreover, the National Security Division of the Department of Justice conducts regular training and oversight to ensure that FISA Court orders are properly implemented. In addition, agencies that use these authorities require personnel to participate in comprehensive training programs to ensure that they understand what is permissible under the law, and are implementing automated systems to help ensure that the authorities are properly used. Finally, the use of these FISA authorities is subject to oversight by the appropriate Offices of General Counsel, Inspectors General, and intelligence oversight offices. The Office of the Director of National Intelligence, (including the ODNI's Civil Liberties Protection Officer and his office) has statutory responsibility to ensure that the elements of the Intelligence Community comply with the Constitution and laws of the United States. It works closely with the National Security Division of the Department of Justice to provide oversight of FISA activities.

Finally, Congress is an active player in FISA oversight. Starting with our confirmation hearings, the DNI and I have steadfastly committed to keeping Congress, through the appropriate committees, informed of intelligence activities. This includes keeping Congress fully informed of how these FISA authorities are being used, including classified activities. In addition to the requirements to provide Congress several reports each year on the use of these collection authorities and copies of significant FISA Court opinions, the Congress regularly receives information concerning the use of these authorities to ensure that the authorities are used in compliance with the law and in a manner that protects privacy and civil liberties.

In closing, I would stress that these three authorities are critical to national security investigations and the protection of our nation. They should be reauthorized. Robust substantive standards and procedural protections are in place to ensure that these tools are used responsibly, in a manner consistent with the law, and in a manner that safeguards Americans' privacy and civil liberties. We are committed to working with Congress to obtain reauthorization. We think it is essential that the extension be long enough to provide our intelligence professionals confidence that these important tools will continue to be available to protect national security.

Thank you again for inviting me to this hearing and we are happy to answer any questions you may have.